IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 80-958

HOPLAND NOKOMIS ASSOCIATION, et al.,

Petitioners,

vs.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, et al.,

Respondents,

and

CYNTHIA DANIELS, et al.,

Respondents.

On Writ of Certiorari
to the
United States Court of Appeals
for the Ninth Circuit

PETITIONERS' REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

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The Federal defendants and the plaintiffs below raise four issues in their Oppositions to the Petition for Writ of Certiorari which merit reply.

1. Petitioners' Attack on the Confusing and Misleading Wording of the Ballot is Not a Collateral Attack on the 1978 Final Judgment That Required a Referendum to Be Held, Because the 1978 Judgment Did Not Specify the Wording of the Ballot.

Federal respondents assert: "In August 1978 . . . the court issued a judgment order setting forth the ballot language . . . ." Brief for the Federal Respondents in Opposition (hereinafter "Fed.Resp. Brief") at 2. This view of the August 1978 Judgment was shared by the Court of Appeals, which therefore concluded that the Hopland Nokomis Association was engaged in a collateral attack on the original, final Judgment requiring there to be a referendum. The Court of Appeals considered such a collateral attack to be barred, treated the Association's position as raising nothing more than a discretionary request to re-open the 1978 Judgment, and held that the District Court had not abused its discretion in declining to re-open the Judgment. Pet., Appendix A, at A-2.

This view constitutes a misinterpretation of the original Judgment. In fact, the 1978 Judgment required a referendum on the subject matter specified in paragraph 4 of the Judgment, namely, whether the communally-owned property

of the Hopland Rancheria should remain with the Association or should be transferred to the federal government. But the Judgment did not expressly provide that the legalistic wording of the Judgment should be presented to the voters on the referendum ballot. Judgment, Pet., Appendix F, at A-29 to A-30. The Bureau of Indian Affairs subsequently made a decision -- not specifically required by the 1978 Judgment -- to simply use the language of the Judgment as the language of the ballot, notwithstanding the difficulties that the voters would have in understanding such a ballot.

Because it does not object to the Indian Voters of the Hopland Rancheria making a choice, Petitioner Hopland Nokomis Association does not challenge the original Judgment. Petitioner's objection is rather that the voters could not make that choice in a meaningful way, because the wording of the ballot tended to lead the average voter to select the choice opposite to the one that he or she would intend. No such ballot language was required by the Judgment.

2. The Mixed Factual and Legal Character of the Issue Presented Does Not Preclude Effective Review in This Forum, Because This Court Has the Power to Examine the Facts Where Constitutional Interests are at Stake, Particularly Where the Central Factual Issue Concerns the Reading to Be Given a Written Ballot Equally Accessible to This Court.

The plaintiffs below assert in their brief opposing the Petition that both the District Court and the Court of Appeals found as a matter of fact that "there was no significant evidence that . . . the language of the ballot . . . in any way confused, misled or intimidated the voters." Indian Respondents' Opposition to Petition for Writ of Certiorari (hereinafter "Plaintiffs' Brief") at 13.

The District Court did find that the voters were not confused by the ballot. Order Granting Motion to Convey Title, etc., Pet., Appendix D, at A-10, A-11. This finding does not preclude effective appellate review for two reasons. First, given the fundamental importance of an effective franchise, "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." Reynolds v. Sims, 377 U.S. 533, 562 (1964). Second, less deference may be given the trial court's finding when it largely involves the assessment of a writing, such as the ballot here, which is equally accessible to the appellate court. In another context, involving libel, this Court stated:

> [W]e must . . . in proper cases review the evidence to make certain that those [constitutional] principles have been constitutionally applied. . . . [W]e "examine

> for ourselves the statements in issue and the circumstances under which they were made . . . ."
>
> New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964).

The Hopland Nokomis Association has proposed the following constitutional standard for instances in which property is to be taken away as a result of a referendum: Was the ballot so confusing and misleading that voters who sought one outcome might be led to vote for the opposite outcome? Pet. at 12-13.

If such a test were to be applied, it is obvious that the most important single piece of factual evidence would be the ballot itself. The ballot actually presented to the Indian voters of the Hopland Rancheria, Official Ballot, Pet., Appendix H, at A-35 to A-36, is part of the record. This Court is perfectly capable of reading that ballot and determining its inherently confusing character. The factual finding of the District Court is therefore no impediment to the Court considering the important mixed questions of fact and law presented in the Petition.1/

1/ Although the Federal Respondents assert, in a general fashion, that "the Indian voters had advance notice of the

(continued on next page)

3. Petitioners' Election to Present their Claims as a Defense to the Federal Defendants' Rule 70 Motion to Vest Title Did Not Constitute a Waiver of Those Constitutional Claims, and Was Not So Considered By Either Court Below.

The plaintiffs and the federal respondents have asserted that the Association did not attack the ballot in a timely fashion or avail itself of purported administrative remedies. Fed. Resp. Brief at 3,4; Plaintiffs' Brief at 15.

(Continued from p. 6) election and the ballot," Fed. Resp. Brief at 4, they do not and cannot claim that the actual wording of the ballot was seen by any voter before walking into the polling place. Their more precise claim, consistent with the factual picture drawn by the Petition, is only that "four months before the election, the Bureau of Indian Affairs sent all eligible voters a notice of the referendum paraphrasing the two options set forth in the judgment." Id. (emphasis added). Thus, even if the voters thereby understood the subject matter of the referendum, they had no advance notice of the central problem they faced on election day: which way to vote to get their desired choice.

Although the Court of Appeals noted in passing that no administrative review had been sought, Pet., App. A, at A-3, neither the District Court nor the Court of Appeals held that the Association's due process claims were waived by any failure to seek administrative review.2/

Of course, the Petitioners had no opportunity to protest the wording of the referendum in advance because they, like the other Indian voters, had no notice of the actual wording of the ballot prior to the day of the referendum. After the referendum took place, the Association elected to contest the validity of the referendum by declining to execute deeds conveying its property to the federal government. The Association thereby forced the government to move to vest title pursuant to Rule 70, F.R.Civ.P.; and the Association presented its objections to the ballot and the referendum as defenses to the Rule 70 motion.

2/ Federal Respondents assert: "The court of appeals also correctly observed (Pet. App.A-3) that petitioners failed to seek administrative review of the election results and thus may not be heard to complain." Fed. Resp. Brief at 4, n. 1 (emphasis added). The Court of Appeals did not draw the conclusion that respondents assert. See Pet., Appendix A, at A-3.

No statute, administrative code section or case has been cited by either respondent, indicating that petitioners' election to present its constitutional claim as a defense constitutes a waiver. The 1978 Judgment made no provision concerning review of complaints about the wording of the ballot. And both the District Court and the Court of Appeals considered the Association's due process claim, notwithstanding any supposed waiver. This Court is free to reach Petitioner's constitutional claims if it deems them worthy of consideration.

4. The First Amendment Issues are Properly Before This Court.

The plaintiffs claim that voters' rights under the First and Fourteenth Amendments cannot be raised on certiorari because they were not raised below. We do not, of course, raise any Fourteenth Amendment claims in this Court. It is action by federal officers of which we complain.

Petitioners' first reason for granting the writ -- namely, that the Association was deprived of its property without due process of law when the District Court ordered a conveyance pursuant to a confusing and misleading ballot -- was raised in both courts below, and ruled upon by them. Pet., Appendix A, at A-2; Appendix D, at A-10 to A-11.

The First Amendment cases are instructive to the issue of whether Petitioners were denied due process of law. And the denial of due process here has implications throughout the federal government with respect to the standards for conducting elections. The issue is the same one that was fully presented below -- did these voters lose their property on the basis of an unfair election? The First Amendment issue, to the extent that it is considered separate from the voting due process issue, is certainly ancillary to the major issue and may be considered by the Court. Sup. Ct. R. 21.1(a); see, Procunier v. Navarette, 434 U.S. 555, 559, n. 6 (1978).

Conclusion

For hundreds of years, American Indians have been stripped of their land by the federal government, often through the use of legalisms not understood by the Indians. Although Petitioners do not claim that the confusing legalisms of the ballot were part of a deliberate scheme to misled the voters of the Hopland Rancheria, the effect was the same. A legal mechanism which was in this case expressly intended to allow the Indians to make a free choice was converted into its opposite.

The Court should grant the writ so that the Indian voters are given an opportunity to make a true choice, and so that minimum standards for such exercises of the franchise may be drawn.

Respectfully submitted,

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